

ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

RECEIVED

MAR - 9 1998

In the Matter of

Petition of US West Communications, Inc.  
For Waiver of Sections 61.45(d), 61.46(d) and  
69.152 of the Commission's Rules

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 97-149

COMMENTS OF THE  
AMERICAN PUBLIC COMMUNICATIONS COUNCIL

Albert H. Kramer  
Robert F. Aldrich  
Valerie M. Furman  
DICKSTEIN SHAPIRO MORIN  
& OSHINSKY LLP  
2101 L Street, N.W.  
Washington, D.C. 20037-1526  
(202) 828-2226

Attorneys for the American Public  
Communications Council

March 9, 1998

No. of Copies rec'd 024  
List ABCDE

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

---

In the Matter of )

Petition of US West Communications, Inc. )  
for Waiver of Sections 61.45(d), 61.46(d) and )  
69.152 of the Commission's Rules )

---

CC Docket No. 97-149

**COMMENTS OF THE  
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

Pursuant to the Commission's Public Notice, DA 98-224, released February 5, 1998, the American Public Communications Council ("APCC") hereby respectfully submits its comments regarding US West Communications, Inc.'s ("US West") Petition for waiver of Sections 61.45(d), 61.46(d) and 69.152 of the Commission's Rules. US West requests permission to impose End User Common Line ("EUCL") charges in excess of the amount specified under the Commission's Rules, in order to recover refunds paid to other customers for a prior period.

APCC is a national trade association that represents approximately 2,000 independent payphone service providers ("PSPs"). APCC's members subscribe to telephone service from U S West or other LECs, and are assessed the EUCL charge and other charges by U S West and other LECs. Recently, APCC's members have incurred substantially increased local service costs due to the imposition of higher EUCL charges and several additional new charges, among them Universal Service Fund fees, and Universal

Service Fund and Primary Interexchange Carrier ("PIC") pass-through charges. These charges have been imposed at the same time that Congress through Section 276 of the Telecommunications Act of 1996 ("the Act") is seeking to encourage wide deployment of payphones. 47 U.S.C. § 276(b). APCC's members are attempting to comply with the spirit of the Act by increasing deployment of payphone service throughout the country. APCC's members, as well as the Commission have a strong interest in avoiding imposition of further charges on PSPs, so that PSPs can expand and improve service to the public.

Permitting US West to impose retroactive EUCL charges in excess of the amount specified under the Commission's Rules would be illegal, unfair, and inconsistent with Congressional objectives regarding payphone service. Therefore, for the reasons set forth below, the Commission should not grant US West's request.

**I. US WEST'S REQUEST VIOLATES THE FILED RATE DOCTRINE AND THE RULE AGAINST RETROACTIVE RATEMAKING**

Two related doctrines -- the filed rate doctrine and the rule against retroactive ratemaking -- generally prohibit the Commission from retroactively modifying a tariffed rate previously prescribed by the Commission. The filed rate doctrine provides that a regulated entity is forbidden to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.<sup>1</sup> Under this doctrine, the Commission may not impose a retroactive rate adjustment for a previous period in which a Commission-approved rate had been charged. The rule against retroactive ratemaking prevents the

Commission from imposing prospective surcharges or refunds to compensate parties for over-recoveries or under-recoveries experienced in prior periods.<sup>2</sup> Therefore, "even charges that are imposed prospectively, and therefore satisfy the filed rate doctrine, are improper if they are based on losses in a prior period."<sup>3</sup>

US West's 1997 annual access tariff was filed on June 16, 1997, and was scheduled to take effect on July 1, 1997. Subsequent to that filing, the Commission suspended US West's tariff, imposed an accounting order on US West, and instituted an investigation into all incumbent local exchange carrier ("LEC") 1997 access tariffs. Following its investigation, the Commission directed that US West and other LECs file revised tariffs that incorporated the changes mandated in the *Refund Order*, specifically, recalculated CCL rates for the period January 1, 1998 through June 30, 1998.<sup>4</sup> The changes mandated by the Commission in the *Refund Order* with respect to recalculation of rates relate exclusively to CCL, and make no mention of any adjustment to EUCL charges. Because the rates for which the Commission ordered a recalculation were subject to an accounting order at the time such recalculation was ordered, and because the recalculation was not intended to compensate parties for over-recoveries or under-recoveries experienced in prior periods, it was permissible for the Commission to effectuate a prospective rate change. However, if the Commission grants US West's request, the Commission will be allowing

---

<sup>1</sup> *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

<sup>2</sup> *Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1070 n.2 (D.C. Cir. 1986).

<sup>3</sup> *Public Utilities Commission of the State of California v. FERC*, 988 F.2d 154, 160 (D.C. Cir. 1993).

US West to both retroactively modify its EUCL rate and compensating US West for an under-recovery experienced in a prior period, neither of which is consistent with the filed rate doctrine and the rule against retroactive ratemaking. Accordingly, Commission grant of U.S West's request at this time would violate both the filed rate doctrine and the rule against retroactive rate making.

## **II. THE COMMISSION DID NOT INTEND FOR US WEST TO RECOUP ITS UNDER-RECOVERED EUCL CHARGES FOR JULY – DECEMBER 1997**

---

The Commission's *Access Charge Reform Order* released in May 1997<sup>5</sup> significantly shifted LEC recovery of common line costs from interexchange carriers ("IXCs") to certain end users and from per-minute to flat-rated charges. Because of this, the Commission closely scrutinized the methods LECs used to develop their new common line rates. After reviewing the 1997 annual access tariffs filed by the LECs, the Commission found that these tariffs raised substantial questions of lawfulness and designated certain issues for investigation. Among the issues to be investigated was whether certain LECs had consistently underestimated their base factor portion ("BFP") forecasts over the years.

In paragraph six of the *Refund Order*, the Commission specifically directs all affected carriers to do two things: (i) recalculate their common line rates for the period January 1, 1998 through June 30, 1998, and (ii) calculate refunds for the period July 1,

---

<sup>4</sup>See In the Matter of 1997 Annual Access Tariff Filings, CC Docket No. 97-149, Memorandum Opinion and Order (released December 1, 1997) at paras. 4, 6 ("*Refund Order*").

1997 through December 31, 1997.<sup>6</sup> However, as US West correctly notes in its petition, the Commission did not specifically authorize US West, or any other affected carrier, to charge its recalculated EUCL rates for July through December 1997.<sup>7</sup> APCC submits that the reason for this omission is simple: the Commission clearly did not intend for US West to collect such under-recovered EUCL amounts from multiline business customers.

The Commission determined in the *Refund Order* that US West had historically underestimated its BFP, and formally prescribed a BFP forecast for US West. It appears that the Commission's goal in the *Refund Order*, was to rectify underestimated BFP projections by US West, and ensure that such a situation would not occur in the future. However, nowhere in the *Refund Order* does it appear that the Commission had any intention for US West to recover any under-recovered EUCL charges from end users.

The Commission's Common Carrier Bureau ("CCB") held in a recent order that the fact that a refund has been mandated for a faulty rate does not necessarily bestow upon a carrier the right to increase a different rate to compensate for such a refund.<sup>8</sup> In its *1993-1996 Annual Access Order*, the Commission had directed Bell Atlantic and Pacific Bell to recalculate their various basket pricing limits and to make refunds when the recalculated

---

<sup>5</sup> In the Matter of Access Charge Reform, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May 16, 1997).

<sup>6</sup> See Refund Order at para. 6.

<sup>7</sup> See Petition of US West for Waiver of Sections 61.45(d), 61.46(d) and 69.152 of the Commission's Rules (filed February 2, 1998) at page 3. ("*US West Petition*").

<sup>8</sup> See In the Matter of 1993 Annual Access Tariff Filings; GSF Order Compliance Filings; In the Matter of 1994 Annual Access Tariff Filings; In the Matter of 1995 Annual Access Tariff Filings; In the Matter of 1996 Annual Access Tariff Filings, CC Docket No. 93-193,

pricing limits were less than what Bell Atlantic and Pacific Bell actually charged for the time periods in question.<sup>9</sup> The CCB subsequently ruled that this was the case for the common line basket and that the carriers were required to implement a refund for that basket, but emphasized that its order did not specify that carriers would be entitled to raise rates if a revised basket pricing limit was higher than what was actually charged and that nothing in the order supported a conclusion that rate increases were contemplated as a result of the Commission's decision.<sup>10</sup> In making its decision in that case, the CCB noted its "long-standing policy that carriers cannot generally recoup past undercharges by prospective rate increases."<sup>11</sup> The CCB held that no departure from that policy was warranted.<sup>12</sup>

---

Phase I, Part 2, CC Docket No. 94-65, Memorandum Opinion and Order, DA 97-1326 (rel. June 25, 1997).

<sup>9</sup> In the Matter of 1993 Annual Access Tariff Filings; GSF Order Compliance Filings; In the Matter of 1994 Annual Access Tariff Filings; In the Matter of 1995 Annual Access Tariff Filings; In the Matter of 1996 Annual Access Tariff Filings, CC Docket No. 93-193, Phase I, Part 2, CC Docket No. 94-65, Memorandum Opinion and Order, FCC 97-139 (rel. April 17, 1997).at paras. 39, 104-106. ("*1993-1996 Annual Access Order*").

<sup>10</sup> In the Matter of 1993 Annual Access Tariff Filings; GSF Order Compliance Filings; In the Matter of 1994 Annual Access Tariff Filings; In the Matter of 1995 Annual Access Tariff Filings; In the Matter of 1996 Annual Access Tariff Filings, CC Docket No. 93-193, Phase I, Part 2, CC Docket No. 94-65, Memorandum Opinion and Order, DA 97-1326 (rel. June 25, 1997) at para. 14.

<sup>11</sup> *Id.* at para. 15.

<sup>12</sup> *Id.* at para. 18. The CCB also rejected Bell Atlantic and Pacific Bell's arguments that equity required the CCB to allow offsetting increases. The CCB noted that there was no guarantee that those customers that benefited from the reduced rates arising from misallocation would be the same ratepayers paying the proposed offset amounts because of the constantly changing marketplace. *Id.* The Commission, therefore, concluded that the proposed rate increase could have the effect of penalizing certain ratepayers for a misallocation. *Id.* APCC submits that the Commission's conclusion in the above matter is applicable to the instant matter, as well. A number of APCC's members are first-time payphone service providers, who have entered the business as a result of the Act's encouragement. As such, they would be required to pay the proposed EUCL offset amounts proposed by US West, without necessarily having benefited from the past reduced

A “do-over” with respect to any collection of under-recovered EUCL charges was not even implicitly authorized in the Commission’s *Refund Order*. Accordingly, it would be contrary to long-standing Commission policy to permit US West to collect such under-recovered EUCL charges.

### III. THE LACK OF A PRIOR COMMISSION-PRESCRIBED FORMULA FOR PROJECTING BASE FACTOR PORTIONS IS IRRELEVANT

US West appears to attribute at least a portion of its situation to the Commission for not specifying in its rules any method for projecting BFP. In its *800 Data Base Reconsideration Order*,<sup>13</sup> the Commission addressed a situation similar to that proposed by US West in the instant matter. In that proceeding, carriers requested that they be permitted to offset decreases in some baskets with rate increases in others, arguing that if the Commission had provided guidance earlier, the carriers could have avoided exogenous adjustments and could have lawfully recovered undercharges elsewhere.<sup>14</sup> The Commission, however, rejected this request, and applied its long-standing policy that carriers generally cannot recoup past undercharges via prospective rate increases.<sup>15</sup> The Commission’s decision was based upon the reasoning of the Supreme Court in FPC v. Tennessee Gas Transmission Co., which held that “the company’s losses in the first

---

EUCL rates arising from US West’s underestimated BFP forecast. Thus, these APCC members would be penalized if the Commission permits US West to charge increased EUCL rates.

<sup>13</sup>In re 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket No. 93-129, Order on Reconsideration, FCC 97-135 (rel. April 14, 1997). (“*800 Data Base Reconsideration Order*”).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

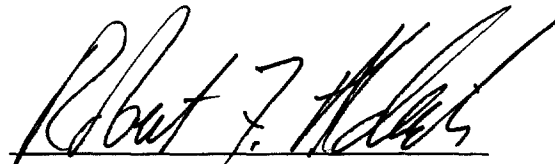
instance do not justify its illegal gain in the latter . . . . The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . . shoulder the hazards incident to its actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate.”<sup>16</sup> Accordingly, the lack of a prior prescribed Commission rule for forecasting BFP is irrelevant.

#### IV. US WEST’S PETITION FOR WAIVER IS PREMATURE

As US West notes, there is a Petition for Reconsideration currently pending on reconsideration before the Commission regarding the *Refund Order*.<sup>17</sup> Because of this, it is quite possible that US West may in fact never be required to refund anything to the IXC’s. Accordingly, US West’s request remains premature until such time as a final decision has been issued in this matter.

Dated: March 9, 1998

Respectfully submitted,



Albert H. Kramer  
Robert F. Aldrich  
Valerie M. Furman  
DICKSTEIN SHAPIRO MORIN  
& OSHINSKY LLP  
2101 L Street, N.W.  
Washington, D.C. 20037-1526  
(202) 828-2226

Attorneys for the American Public  
Communications Council

---

<sup>16</sup> FPC v. Tennessee Gas Transmission Co., 371 U.S. 145, 152-53 (1962).

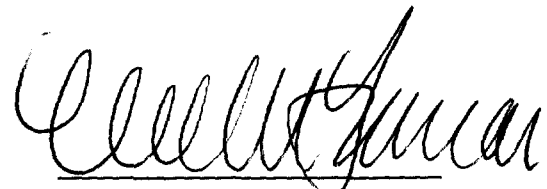
<sup>17</sup> See Petition for Reconsideration of Bell Atlantic, In the Matter of 1997 Annual Access Tariff Filings, CC Docket No. 97-149 (filed December 31, 1997).

Communications Council

**CERTIFICATE OF SERVICE**

I hereby certify that on March 9, 1998, a copy of the foregoing Comments of the AMERICAN PUBLIC COMMUNICATIONS COUNCIL was sent by first class United States mail to the following:

Robert B. McKenna  
Richard A. Karre  
US West Communications, Inc.  
1020 19<sup>th</sup> Street, N.W.  
Suite 700  
Washington, D.C. 20036  
  
Attorneys for U.S West Communications, Inc.



Valerie M. Furman